109-146

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1237.~~ 850

THE UNITED STATES, APPELLANT,

vs.

CHARLES MITCHELL.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 27, 1883.

SUPREME COURT OF THE UNITED STATES.

No. 1237.

THE UNITED STATES, APPELLANT,

vs.

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4 Court of Claims, December term, 1881.

CHARLES MITCHELL
vs.
THE UNITED STATES. } No. 13371.

I. *Petition.—Filed Nov'r* 22, 1882.

To the honorable the Court of Claims:

The claimant, Charles Mitchell, respectfully shows to this honorable court that on the first day of July, in the year 1878, he was duly appointed an interpreter for the Santee Indian Agency, in the State of Nebraska, and then and there entered upon the duties of said office, and served as such for two years and three months, to wit, till the 30th day of September, in the year 1880; that he was again appointed as interpreter aforesaid on the first day of March, in the year 1881, and remained such interpreter for the period of one year and four months, to wit, till the 30th day June, in the year 1882, and that he still holds said office; that the salary of all interpreters lawfully employed in the service
2 of the United States elsewhere than in the State of Oregon or the Territories of Utah and *and* New Mexico is fixed by section 2070 of the Revised Statutes at four hundred dollars a year; and by section 2076 of said statutes it is provided that that compensation shall be in full of all emoluments or allowance whatsoever except a reasonable allowance or provision for offices and office contingencies; that notwithstanding this provision of law he was only paid at the rate of three hundred dollars a year during the two several periods hereinbefore named, of two years and three months and one year and four months respectively, being in all three years and seven months; that said deficiencies in his pay were caused by the insufficiency of the appropriation made by the Congress of the United States, who only appropriated at the rate of three hundred dollars a year; but, as he is advised, the insufficiency of the appropriations so made constitutes, according to the decisions of this court, no bar to his recovering in this court the full compensation provided by the general and permanent law; that the claimant therefore claims the difference between his pay, at the rate of three hundred dollars a year, appropriated and paid him as aforesaid, and the pay, at the rate of four hundred dollars a year, as provided by the Revised Statutes of the United States; that said difference calculated from the first day of July, 1878, to the 30th day of September 1880, and from the first day of March, 1881, to the 30th day of June, 1882, being in all three years and seven months, amounts to the sum of three hundred and fifty-eight dollars and thirty-three cents, which amount he claims.

That no action has been had on this claim, in Congress or by any of the Departments; that the claimant is the sole owner of this claim, and the only person interested therein; that no assignment or transfer of this claim, or of any part thereof or interest therein has been made; that the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; that the claimant is a
3 citizen of the United States, and has at all times borne true allegiance to the Government thereof; and has not in any way vol-

untarily aided or given encouragement to rebellion against the said Government.

That the claimant believes the facts as stated in this petition to be true; and the claimant demands judgment for $358.33.

GEORGE A. KING,
Attorney for Claimant.

DISTRICT OF COLUMBIA:

George A. King, being duly sworn, deposes and says: I am attorney for the claimant in this case. I have read the above petition, and the facts therein stated are true to the best of my knowledge and belief.

GEORGE A. KING.

Subscribed and sworn to before me this 22d day of November, 1882.

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

4 II. *Traverse.—Filed Jan'y* 23, 1883.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney-General.

5 III. *Findings of fact and conclusion of law.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. Under the provisions of Revised Statutes, section 2068, the Indian agent at Santee Agency, Nebraska, on the 5th of July, 1878, nominated the claimant, Charles Mitchell, as interpreter at that agency, from July 1, 1878, and the appointment was approved by the Department of the Interior.

He served in that capacity under his original and subsequent nominations and appointments, made in like manner, for two years and three months, to wit, until September 30, 1880, when he was discharged.

On March 3, 1881, he was again nominated by the same agent for the same position, to date March 1, 1881, and the nomination was approved accordingly by the Department of the Interior.

He served in that capacity for one year and four months, to wit, till June 30, 1882, from which date he was again appointed and held the office till the time of filing of this petition.

II. During the whole period of three years and seven months, named in the preceding finding, the compensation paid to the claimant by the Department has been at the rate of $300 a year only.

III. At intervals during the whole period of service the claimant received payment from the disbursing officer of the agency at the rates and to the amounts appropriated in the annual appropriation acts, and he signed receipts therefor in the following form on printed blanks:

We, the subscribers, hereby acknowledge to have received of —— ——, Indian agent at the Santee Indian Agency, Nebraska, the sums set opposite our names respectively, being in full of our pay for services for the period herein expressed.

CONCLUSION OF LAW.

On the foregoing findings of fact, the court decides as a conclusion of law—

That the claimant is entitled to recover the sum of $358.33, that being the difference between the salary of his office as established by law and the amount paid to him during his term of service.

IV. *Opinion.*

RICHARDSON, J., delivered the opinion of the court.

In each of these cases the claimant seeks to recover the difference between the salary established by law for the office which he held and the amount paid to him in accordance with the appropriations made by Congress.

The claimant Mitchell was an interpreter at the Santee Indian agency in Nebraska, duly nominated by the proper Indian agent and approved by the Department of the Interior, in accordance with the provisions of Revised Statutes, section 2068. He held the office and performed its duties during a period of three years and seven months.

By section 2070 of the Revised Statutes the salary of an interpreter employed elsewhere than in Oregon, Utah, and New Mexico, as was the claimant Mitchell, was fixed at $400 a year.

The annual appropriation acts for the time of the service of Mitchell appropriated only $300 a year for his salary (act of May 27, 1878, ch. 142; 20 Stat. L., 63; act of February 17, 1879, ch. 87; 20 Stat. L., 295; act of May 11, 1880, ch. 85; 21 Stat. L., 114; act of March 3, 1881, ch. 137; 21 Stat. L., 485), and he was paid in accordance therewith, making for the whole time a sum less by $358.33 than the amount of the salary fixed by the Revised Statutes.

The claimant Lightner was an Indian agent at the Santee Indian agency, and was one of the fourteen Indian agents authorized by Revised Statutes, section 2052, for tribes east of the Rocky Mountains, and whose salary was there fixed at $1,500 a year each.

By the annual appropriation act of May 27, 1878, chapter 142 (20 Stat. L., 63), the sum of $1,000 only was appropriated for the salary of that agent for the fiscal year ending June 30, 1879. By the subsequent appropriation acts for the fiscal years ending June 30, 1880, 1881, and 1882 (act of February 17, 1879, 20 Stat. L., 295; act of May 11, 1880, chap. 85, 21 Stat. L., 114; act of March 3, 1881, chap. 137, 21 Stat. L., 485),

the sum of $1,200 each year only was appropriated for that purpose. Under these appropriations the claimant was paid, in all, a sum less by $1,441.48 than the amount of his salary for the time of service as established by the Revised Statutes.

The claimant Belknap was one of the four Indian agents for the tribes in California, which, by Revised Statutes, section 2052, the President was authorized to appoint at a salary of $1,800 a year.

By the several annual appropriation acts for the fiscal years ending June 30, 1879, 1880, 1881, and 1882 the sum of $1,000 a year only was appropriated for his office. (Act of May 27, 1878, ch. 142, 20 Stat. L., 63; act of February 17, 1879, ch. 87, 20 Stat. L., 295; act of May 11, 1880, ch. 85, 21 Stat. L., 114; act of March 3, 1881, ch. 137, 21 Stat. L., 485.) He was paid in accordance with the appropriations a sum less by $3,400 than the salary fixed by the Revised Statutes.

7 Each of these claimants having held an office to which there was a fixed salary attached by law, is entitled to recover the full amount, less the sums which have been paid to him. It is no defense that Congress failed to appropriate the entire amount due while it left unrepealed the law which established the salary.

It was said by the Chief Justice, speaking for the court, in Patton's case (7 C. Cls. R., 371):

> All questions of salary are questions of contract. Whether the salary be fixed by law or by the order of a Department under authority of law, the Government contracts to pay the officer his salary, and, failing to do so, is liable to be sued therefor.

The United States can no more discharge its contracts by part performance than can an individual person do so. Congress may fail to appropriate, in whole or in part, the money required for payment of a public creditor, and thus leave the public officers without authority to draw the money from the Treasury for that purpose, but the indebtedness and the liability to pay remain in force.

The legal liability of the Government does not generally depend upon appropriations. The constitutional provision in article 1, section 9, that "no money shall be drawn from the Treasury but in consequence of appropriations made by law," is a mere limitation and restriction upon the executive officers of the Treasury Department, and does not prevent Congress, the law-making power, from involving the Government in contracts to pay money to any extent. When such contracts are made the parties who acquire rights to compensation thereunder must wait until an appropriation is made before they can receive their money, but the right on their part and the obligation on the part of the United States remain unchanged. Failing to obtain direct appropriations for their benefit, public creditors may sue in this court, and thus obtain payment out of any money appropriated for the payment and satisfaction of private claims. (Rev. Stat., section 1089.)

In the present cases Congress saw fit to allow the statutes fixing the claimants' salaries to remain unrepealed until after the periods of time during which they held office, and then they repealed the provisions. (Act of May 17, 1882, 22 Stat. L., 70; act of March 1, 1883, 22 Stat. L., —.) That repeal, however, affects only salaries from and after the passage of the acts, and does not take away the claimants' accrued rights. It was so

held by the Supreme Court in the twenty per cent. cases of Welsh, &c., v. The United States (20 Wall., 179, and 9 C. Cls. R., 103).

Congress did not, as in Fisher's case (15 C. Cls. R., 330), provide in these appropriation acts that the amounts appropriated should be in full compensation for the salaries, and so those acts did not work even a temporary repeal.

We have repeatedly held that salaried officers may recover in this court the balance due them under general law over and above what Congress has neglected to appropriate for that purpose, and we reaffirm the doctrine in these cases (Graham's case, 1 C. Cls. R., 380; Collins' case, 15 C. Cls. R., 22; French's case, 16 C. Cls. R., 419).

It appears that, in paying these claimants, the disbursing officers took a receipt from each one of them, on a printed blank, in which it was stated that the sums received by them were "in full of our pay for services for the period herein expressed." On the part of the defendants the question is raised whether or not this is not an accord and satisfaction and a discharge of all obligations to pay the balance. We are clearly of opinion that it is not so.

8 The claimants' salaries, fixed by statute, were not disputed or disputable claims, such as a voluntary release in full, made upon part payment, has been held, under certain circumstances, to be a discharge of the whole. (Ramsdell's case, 2 C. Cls. R., 508; Livingston's case, 3 C. Cls. R., 131; Martin's case, 5 C. Cls. R., 215; affirmed on appeal, 9 C. Cls. R., 126; Sweeney's case, 5 C. Cls. R., 285; affirmed on appeal, 17 Wall., 75, and 8 C. Cls. R., 134; Clyde's case, 13 Wall., 35, 38, and 7 C. Cls. R., 262.)

If, however, the amounts of the salaries actually due the claimants were matters of doubt and uncertainty, it was no part of the duty of the disbursing officers to raise that question and to exact a release of the whole upon payment of part only. Such officers were not charged with the duty of settling controverted claims upon the Government in disbursing money appropriated for salaries, and they had no authority to exact receipts in the form of a release in full of claims which were paid only in part. The disbursing officers were dealing, not with disputed claims and controverted rights, but solely with the disposition of the money appropriated by Congress which had been intrusted to them to pay out, and they were taking receipts for the actual amount disbursed for the sole purpose of settling therewith their own accounts in the Treasury Department.

We must construe the receipts in the light of the circumstances under which they were given, and with reference to the matters in charge of the disbursing officers. Taking these into consideration it is clear that the parties had no intention of settling and releasing any rights of claimants under the acts establishing their salaries, and that all that was meant by the words "in full of our pay for services" was that the disbursing officers had paid the full amount appropriated by Congress and intrusted to them to disburse. Receipts thus given discharge no indebtedness beyond the amount of money received. Even in Fisher's case (15 C. Cls. R., 330), where there was a receipt in full on the payment of a salary, the amount of which was not only disputable and disputed, but as to which the judges of this court were divided in opinion, we gave no force or effect to such a receipt.

The judgment of the court is that the several claimants recover—
The claimant Mitchell the sum of $358.33.
The claimant Lightner the sum of $1,441.48.
The claimant Belknap the sum of $3,400.
And it is so ordered.

9 V. *Judgment of the court.*

At a Court of Claims held at the city of Washington, on the 19th day of March, A. D. 1883, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said Charles Mitchell do have and recover of and from the United States the sum of three hundred and fifty-eight $\frac{33}{100}$ dollars ($358.33).

10 VI. *Application of defendants for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 19th day of March, 1883, in favor of claimant, the defendants, by their Attorney-General, on the 26th day of March, 1883, make application for and give notice of an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Assistant Attorney-General.

Filed March 26, 1883.

And now, to wit, March 26, 1883, it is ordered that the appeal be allowed as prayed for.

11 VII. In the Court of Claims.

CHARLES MITCHELL
vs.
THE UNITED STATES. } No. 13371.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact by the court, and the conclusion of law thereon; of the opinion of the court; of the final judgment of the court; of the application of the defendants for allowance of appeal to the Supreme Court of the United States, and of the order allowing same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this twenty-sixth day of March, A. D. 1883.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 1237. The United States, appellant, vs. Charles Mitchell. Court of Claims. Filed 27' March, 1883.

109-146

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OFFICE SUPREME COURT U.S.
FILED
APR 2 1883
JAMES H. McKENNEY, Clerk

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

THE UNITED STATES, APPELLANT, *vs.* CHARLES MITCHELL. } No. 1237. Appeal from the Court of Claims.

BRIEF FOR THE APPELLANT.

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In the Supreme Court of the United States.

OCTOBER TERM, 1882.

THE UNITED STATES, APPELLANT, *vs.* CHARLES MITCHELL. } No. 1237. Appeal from the Court of Claims.

BRIEF FOR THE APPELLANT.

The substantial facts in the case are that Mitchell was duly appointed interpreter at an Indian agency in Nebraska, and served (between July 1, 1878, and June 30, 1882) three years and seven months, receiving compensation without objection at the rate fixed by annual appropriation acts, which was $300 per annum.

The court below sustained his claim to recover the difference between compensation at that rate and $400 per annum, the rate fixed by section 2070 Revised Statutes.

ASSIGNMENT OF ERROR.

The United States assign for error the judgment rendered in favor of Charles Mitchell upon the facts found,

which do not sustain such judgment, but require one in favor of the defendants below and present appellants.

BRIEF.

It will hardly be disputed that if Congress had placed in the appropriation act of May 27, 1878 (20 Stat., 65), which may be taken as a sample of the acts in question, such language as "The salaries of all interpreters appointed by virtue of sec. 2068 of the Revised Statutes shall be three hundred dollars a year each for the fiscal year ending June 30, 1879," it would have operated as a repeal or suspension of section 2070 for that year.

The court below, as appears by Fisher's case, is content with much less plain language. It finds that effect in the mere insertion of the words "in full compensation" in the general clause at the head of an appropriation act.

Assuming its judgment correct, as we believe it to be, the question here presented is: What substantial difference is there between such an act and one in which those words are not employed? The practical difference found by the court is that in the former case Congress intended to temporarily reduce the salaries of a considerable number of public officers by appropriating a less sum than was provided by precedent legislation, and in the latter it had no such intent, although it did the same substantial thing because it failed to insert "in full compensation," or some equivalent expression.

A fair test of this construction would be to inquire

what intent from that point of view Congress in fact did or could have in the acts in question, and apparently the answer would be that Congress intended to pay certain officers a portion only of their lawful compensation for the current year, on account, as it were, leaving the balance to be appropriated at some other time or to be collected by suit in the Court of Claims.

The absurdity of ascribing such an intent to Congress is manifest. Surely with general prosperity prevailing and an overflowing Treasury, there could neither be occasion nor disposition to postpone or obstruct the payment of any just obligation.

The history of legislation in the Congresses which passed these acts, adverted to by the court below in Fisher's case, shows conclusively that the Congress intended to reduce expenditures, and that one of the principal methods employed was the reduced appropriations for compensation of salaried officers. In view of this well-established fact the occurrence of the phrase "in full compensation" in a particular appropriation act can be regarded only as emphasizing the general intent; otherwise, it must be presumed that in passing the various appropriation acts Congress was governed by one policy as to officials in one, and by another in another, though no possible reason can be given for such course. Why, for example, should the Congress have intended to reduce the salaries of Territorial judges and other officers included in the legislative, executive, and judicial appropriation act any more than of interpreters and agents included in the appropriation act in question passed at the same session?

Passing to the text of the act, the title and the appro-

priating clause show that its object was to provide among other things for the "*current expenses*" of the Indian service, among which, of course, were included official salaries. Can it be supposed that Congress, as to interpreters and agents, in fact intended, in utter disregard of the stated purpose of the act, to provide for but a part of the current expenses, and that without a rational motive or excuse? Is it not more reasonable to presume that Congress considered a temporary reduction necessary or desirable, and took the method in its judgment best fitted to accomplish that purpose? Its power to make such a reduction is undoubted (Embry's case, 100 U. S., 680), and the only question is as to its intent, for with the policy of reduction or of the method employed the courts are not concerned.

Consider, further, the uniform course of legislative dealing with this matter. With offices created and existing only by virtue of an act of appropriation, of which there are many examples, no question can be raised; but taking the strongest other case, as, for instance, an office not judicial, with a fixed tenure and salary attached, there have been many instances in which Congress, without abolishing or regulating in terms the office, has omitted any appropriation of salary (see act August 15, 1876, 19 Stat., 168, where the salary of naval solicitor is dropped for a year; and so also as to Third Assistant Secretary of State, 20 Stat., 183), or has reduced (or even increased) the appropriation for compensation for one or more years. Is it not more reasonable to hold that where Congress before a given fiscal year takes such action, it is in effect a notice to the incumbent that his services during that period would not be required,

or should be rendered at a reduced rate of compensation, than to presume that it intended to evade or repudiate its just obligations?

A good illustration of this course of legislation is afforded by the provisions enacted from time to time respecting the office and compensation of Indian agents.

By section 2052, Revised Statutes, the appointment of forty-two agents was provided for, with specified distribution and at fixed rates of compensation, but on the day of the passage of that enactment an appropriation act was passed providing for sixty-nine agents, and modifying both the distribution and salaries as provided in the Revised Statutes (18 Stat., 147).

In consecutive appropriation acts thereafter the number provided for has varied from fifty-eight to seventy-four. The provision of the Revised Statutes fixing the salaries has been continually disregarded either in special instances or by general changes both of increase and decrease as the respective Congresses deemed expedient, and the President uniformly authorized to dispense with the services of any agent considered in his discretion unnecessary. (See the following statutes: March 3, 1875, 18 Stat., 420; August 15, 1876, 19 Stat., 420; March 3, 1877, 19 Stat., 271; May 27, 1878, 20 Stat., 63; February 17, 1879, 20 Stat., 295; May 11, 1880, 21 Stat., 115; March 3, 1881, 21 Stat., 485; May 17, 1882).

By comparing the provisions of the same acts respecting the interpreters with sections 2068, 2070, Revised Statutes the same condition of things will be found as has been specified with respect to agents.

All this indicates the intention of Congress to treat the

Indian service as a plastic organization, to be moulded by annual legislation so as to conform with the varying and temporary exigencies of the case, and the existence of any limitation upon its authority to so regulate it in the general provisions of the Revised Statutes was never imagined. The opinion of the court below in Bradshaw's case (14 C. Cls. R., 78) on a similar question is pertinent in this connection. It referred to the course of legislation as indicative of the construction of the law, and said:

> Such has been practically the uniform contemporaneous construction by successive Congresses, by the public officers who have administered the law, and by the employés themselves who have received in monthly payments the amounts appropriated for them, and have given receipts therefor in full payment for their services, and we see no reason to change the same or to doubt their correctness.

As to the decisions cited by the court, it is to be observed that in Graham's case it does not appear that the question is discussed by the court, and the others, excepting the case of French, are not analogous. It is but recently, in fact, that cases of this kind have been introduced with such frequency before the court as to give practical importance to the question involved, and that will sufficiently account for its not having been brought up before. The very fact of their rarity in the past, notwithstanding the habitual legislation of Congress in the manner above indicated, tends to strengthen the construction we contend for.

THOMAS SIMONS,
Assistant Attorney-General.
JOHN S. BLAIR,
Of Counsel.

OFFICE SUPREME COURT U.S.
MAR 29 1883
A. McKENNEY, Clerk.

109-141

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 1,237.

THE UNITED STATES, APPELLANTS,

vs.

CHARLES MITCHELL.

BRIEF FOR APPELLEE.

GEORGE A. KING,
Attorney for Appellee.

Thomas McGill & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

October Term, 1882.

THE UNITED STATES, appellants,
vs.
CHARLES MITCHELL. } No. 1,237.

BRIEF FOR APPELLEE.

I.—STATEMENT OF THE CASE.

This is a claim by the appellee, Charles Mitchell, for a balance of salary due him as Indian interpreter at the Santee Agency, Nebraska, under section 2070 of the Revised Statutes of the United States, which, with the accompanying sections, is as follows:

TITLE XXIII.—INDIANS.

Chapter one.—Officers of Indian Affairs; their duties and compensation.

SEC. 2068. An interpreter shall be allowed to each agency. Where there are different tribes in the same agency, speaking different languages, one interpreter may be allowed, at the discretion of the Secretary of the Interior, for each of such tribes. Interpreters shall be nominated, by the proper agents, to the Department of the Interior for approval, and may be suspended by the agent from pay and duty, and the circumstances reported to the Department of the Interior for final action.

SEC. 2070. The salaries of interpreters lawfully employed in the service of the United States, in Oregon, Utah and

New Mexico, shall be five hundred dollars a year each, and of all so employed elsewhere, four hundred dollars a year each.

SEC. 2074. No person shall hold more than one office at the same time under this Title, nor shall any agent, subagent, interpreter, or person employed under this Title, receive his salary while absent from his agency or employment, without leave of the superintendent or Secretary of the Interior; but such absence shall at no time exceed sixty days.

SEC. 2076. The several compensations prescribed by this Title shall be in full of all emoluments or allowances whatsoever. But where necessary, a reasonable allowance or provision may be made for offices and office contingencies.

Instead of the $400 a year fixed by section 2070 as the salary of all interpreters employed elsewhere than in Oregon, Utah, and New Mexico, as was the present claimant, he only received $300 a year.

The present claim is for the difference between what he was thus paid and the salary of $400 established by law.

II.—BRIEF.

I.

It will hardly be denied that this claimant held during the time for which he claims payment a public office, having a fixed salary attached to it by law.

The Constitution, after providing that the President shall nominate and by and with the advice and consent of the Senate shall appoint all officers of the United States, adds: "But the Congress may by Law vest the appointment of such inferior officers as they shall think proper, in the President alone, in the Courts of Law, or the Heads of Departments." Constitution U. S., Art. 2, Sec. 2.

The mode of appointment by the Secretary of the Interior, on the nomination of the Indian Agent, was, there-

fore, a perfectly valid and constitutional one, and was indeed more formal than those upheld by this court in *United States* v. *Hartwell*, 6 Wall., 385, 393, and *United States* v. *Moore*, 95 U. S., 760. In the latter case, the office in question was that of Passed Assistant Surgeon in the Navy, and the appointment to it consisted simply of a letter of the Secretary of the Navy notifying the candidate that he had passed his examination. In the former case, (*United States* v. *Hartwell*, 6 Wall., 385,) the office was that of clerk in the sub-treasury at Boston, appointed by the Assistant Treasurer, with the approbation of the Secretary of the Treasury. It was held that "the defendant was appointed by the head of a Department within the meaning of the constitutional provision upon the subject of the appointing power." (6 Wall., 393.) It was further remarked:

"An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, *emolument*, and duties.

"The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe." *United States* v. *Hartwell*, 6 Wall., 393.

The proposition that the claimant held a regular public office will hardly, we think, be seriously contested. We therefore pass to the next question—

II.

What was the salary of the claimant's office during the time covered by this claim?

Section 2070 of the Revised Statutes fixes the salary at $400 a year, and it is conceded that the section had not been expressly repealed at that time, and was in full

New Mexico, shall be five hundred dollars a year each, and of all so employed elsewhere, four hundred dollars a year each.

SEC. 2074. No person shall hold more than one office at the same time under this Title, nor shall any agent, subagent, interpreter, or person employed under this Title, receive his salary while absent from his agency or employment, without leave of the superintendent or Secretary of the Interior; but such absence shall at no time exceed sixty days.

SEC. 2076. The several compensations prescribed by this Title shall be in full of all emoluments or allowances whatsoever. But where necessary, a reasonable allowance or provision may be made for offices and office contingencies.

Instead of the $400 a year fixed by section 2070 as the salary of all interpreters employed elsewhere than in Oregon, Utah, and New Mexico, as was the present claimant, he only received $300 a year.

The present claim is for the difference between what he was thus paid and the salary of $400 established by law.

II.—BRIEF.

I.

It will hardly be denied that this claimant held during the time for which he claims payment a public office, having a fixed salary attached to it by law.

The Constitution, after providing that the President shall nominate and by and with the advice and consent of the Senate shall appoint all officers of the United States, adds: "But the Congress may by Law vest the appointment of such inferior officers as they shall think proper, in the President alone, in the Courts of Law, or the Heads of Departments." Constitution U. S., Art. 2, Sec. 2.

The mode of appointment by the Secretary of the Interior, on the nomination of the Indian Agent, was, there-

fore, a perfectly valid and constitutional one, and was indeed more formal than those upheld by this court in *United States* v. *Hartwell*, 6 Wall., 385, 393, and *United States* v. *Moore*, 95 U. S., 760. In the latter case, the office in question was that of Passed Assistant Surgeon in the Navy, and the appointment to it consisted simply of a letter of the Secretary of the Navy notifying the candidate that he had passed his examination. In the former case, (*United States* v. *Hartwell*, 6 Wall., 385,) the office was that of clerk in the sub-treasury at Boston, appointed by the Assistant Treasurer, with the approbation of the Secretary of the Treasury. It was held that "the defendant was appointed by the head of a Department within the meaning of the constitutional provision upon the subject of the appointing power." (6 Wall., 393.) It was further remarked:

"An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, *emolument*, and duties.

"The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe." *United States* v. *Hartwell*, 6 Wall., 393.

The proposition that the claimant held a regular public office will hardly, we think, be seriously contested. We therefore pass to the next question—

II.

What was the salary of the claimant's office during the time covered by this claim?

Section 2070 of the Revised Statutes fixes the salary at $400 a year, and it is conceded that the section had not been expressly repealed at that time, and was in full

force unless in some way repealed by a mere failure on the part of Congress to make sufficient appropriations for its enforcement.

It will be observed that there is here no such question as that at issue in the case of *The United States* v. *Joseph W. Fisher*, to be heard along with the present, where the sums appropriated were distinctly stated to be "in full compensation for the service of the fiscal year." The meaning of those words is a question for the court in that case. But no such words are to be found in the act making the insufficient appropriations in the present case. The Indian Appropriation Act of May 27, 1878, 20 Stat. L., 63, begins:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the following sums be, and they are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Indian Department, and fulfilling treaty stipulations with the various Indian tribes, namely:"

And then immediately proceeds to make appropriations for salaries for the various offices of the Indian service, some of which, and among them the $300 appropriated for this claimant, are less than the salaries fixed by law. The subsequent Indian appropriation acts for the years in which payment is claimed, (20 Stat. L., 295; 21 Stat. L., 114, 485,) are in precisely the same language.

The question is thus squarely raised whether a mere insufficiency of appropriation for carrying out a law of the United States can repeal the law. In another form the question might be stated thus: Can a single House of Congress, by neglecting or refusing necessary appropriations to carry out existing laws, nullify those laws? If the position of the United States in this case is maintained, either House has this power.

The learned judge who delivered the opinion of the court below remarks:

"The legal liability of the Government does not generally depend upon appropriations. The constitutional provision in article 1, section 9, that 'no money shall be drawn from the Treasury but in consequence of appropriations made by law,' is a mere limitation and restriction upon the executive officers of the Treasury Department, and does not prevent Congress, the law-making power, from involving the Government in contracts to pay money to any extent. When such contracts are made the parties who acquire rights to compensation thereunder must wait until an appropriation is made before they can receive their money, but the right on their part and the obligation on the part of the United States remain unchanged. Failing to obtain direct appropriations for their benefit, public creditors may sue in this court, and thus obtain payment out of any money appropriated for the payment and satisfaction of private claims." (Rev. Stat., section 1089.)

The position of the learned court, that "the legal liability of the government does not generally depend upon appropriations," is fully sustained by a reference to the nature of appropriation acts, and to the opinions of learned commentators and statesmen, on the right of the House of Representatives to withhold appropriations for the fulfillment of existing law.

An appropriation act is nothing but a mere authorization to the officers of the Treasury to apply certain amounts of money to certain objects. Without such authorization they would be powerless to take any money out of the Treasury for any purpose whatever. This view of the object of an appropriation act is so well settled that for a long time rules have been in force in both Houses of Congress forbidding, with more or less stringency, the introduction into appropriation bills of any change of existing law. Notwithstanding these wholesome rules are not fully lived up to by either House, yet the general principle is fully recognized that changes of existing law are not to be made by appropriation acts. Such acts, therefore, are not to be construed as changing existing law, unless the intention so to

do is plainly manifested and apt language used to carry the intention into effect.

The question early arose as to the right of the House of Representatives to withhold appropriations to carry out treaty stipulations for the payment of money. Treaties and statutes are put by the Constitution upon precisely the same footing as the law of the land. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (Constitution of the U. S., Art. 6.) Hence, the question whether the House of Representatives can abrogate a treaty by withholding necessary appropriations is precisely analogous to the question in the case at bar, whether either House of Congress, by passively withholding necessary appropriations, can abrogate an act of Congress standing unrepealed on the statute-book.

Chancellor Kent ably and conclusively sums up the question as to the right of withholding appropriations to carry out treaties, as follows (1 Kent's Comm., 286):

"The question whether a treaty, constitutionally made, was obligatory upon Congress, equally as any other national engagement would be, if fairly made by the competent authority, or whether Congress had any discretionary power to carry into effect a treaty requiring the appropriation of money or other act to be done on their part, or to refuse it their sanction, was greatly discussed in Congress in the year 1796, and again in 1816. The House of Representatives at the former period, declared by resolution, that when a treaty depended for the execution of any of its stipulations on an act of Congress, it was the right and duty of the House to deliberate on the expediency or inexpediency of carrying such treaty into effect. It cannot be mentioned at this day, without equal regret and astonishment, that such a resolution passed the House of Representa-

tives on 7th of April, 1796. But it was a naked, abstract claim of right, never acted upon; and Congress shortly afterwards passed a law to carry into effect the very treaty with Great Britain which gave rise to that resolution. President Washington in his message to the House of Representatives of the 30th of March, 1796, explicitly denied the existence of any such power in Congress; and he insisted that every treaty duly made by President and Senate, and promulgated, thenceforward became the law of the land.

"If a treaty be the law of the land, it is as much obligatory upon Congress as upon any other branch of the government, or upon the people at large, so long as it continues in force and unrepealed. The House of Representatives are not above the law, and they have no dispensing power. They have a right to make and repeal laws, provided the Senate and President concur; but without such concurrence, a law, in the shape of a treaty, is as binding upon them as if it were in the shape of an act of Congress, or of an article in the Constitution, or of a contract made by authority of law. The argument in favor of the binding and conclusive efficacy of every treaty made by the President and Senate is so clear and palpable that it has probably carried very general conviction throughout the community; and this may now be considered as the decided sense of public opinion. This was the sense of the House of Representatives in 1816, and the resolution of 1796 would not now be repeated." 1 Kent's Comm., 286, 287.

Similar views are expressed by William Pinkney, probably the greatest lawyer who ever appeared at the bar of this court. Wheaton's Life of Pinkney, p. 517.

And to the like effect is Judge Story; 2 Story on the Constitution, 1346–1349, 1841. See also *Reeside* vs. *Walker*, 11 How., 272.

So too, in 1877, when the 44th Congress adjourned without passing any appropriation act for the support of the army for the year ending June 30, 1878, President Hayes did not find it necessary to convene an extra session of Congress till October, when nearly a third of the fiscal year

had gone by. In the meantime the army was kept up and contracts entered into under existing laws, without waiting for appropriations. These were necessary in order to draw the money from the Treasury, but not necessary to charge the government with legal liability. His course was taken after much deliberation, was generally approved at the time, and the army appropriation act was cheerfully passed when Congress met in October, though the House of Representatives was of the opposite political party.

All this shows that the duties and rights of public officers, and the liability of the government are generally regulated by laws permanent in their character, and that appropriations are made simply to get the money out of the Treasury to carry out existing laws.

It can hardly then be claimed that section 2070 of the Revised Statutes fixing claimant's salary at $400 a year was repealed by the mere insufficiency of the appropriations to carry it into effect. Such a construction would put it in the power of a single House of Congress, by passively refusing appropriations, to repeal or nullify laws inscribed upon the statue book. Besides, repeals by implication are never favored, and the supposition of such a repeal will never be indulged where it can be avoided. Sedgwick on Statutory and Constitutional Law, 98; *Wood* v. *United States*, 16 Pet., 342; *Henderson's Tobacco*, 11 Wall., 652, 657; *Murdock* v. *City of Memphis*, 20 Wall., 617; and *Town of Red Rock* v. *Henry*, decided by this court at the present term.

Though the precise point raised by this case has never been before this court before, it has been incidentally in question in cases where salaries have been claimed under general and permanent laws defining compensation of public officers. Such cases have been considered and adjudged by this court on their merits, and on the construction of general laws fixing the compensation, without reference to the question whether there was or was not an adequate appropriation available for their payment. Among others

may be cited *Donovan* v. *United States*, 23 Wall., 383; *United States* v. *McLean*, 95 U. S., 750; *United States* v. *Moore*, 95 U .S., 760; and *Folger* v. *United States*, 103 U. S., 30.

Attention is also called to the fact that section 2070 of the Revised Statutes, under which the salary of $400 a year is claimed in this case, has been repealed from the beginning of the present fiscal year. The Indian appropriation act of May 17, 1882, U. S. Statutes, Forty-seventh Congress, 1st session, p. 70, contains the following provision: "For the payment of necessary interpreters, to be distributed in the discretion of the Secretary of the Interior, $20,000; and section 2070 of the Revised Statutes be, and the same is hereby, repealed." This repeal does not of course affect accrued rights, such as those asserted in the present case. (The Twenty-per-cent. Cases, 20 Wall., 179, 185–188.) But the repeal *does* show that Congress regarded the section as in force until repealed. Attention was, in fact, strongly drawn to the section. Its repeal was opposed by the chairman of the Committee on Indian Affairs, and by other prominent members of the House. Although adopted by the House, it was disagreed to by the Senate, and was thus one of the points of difference between the two Houses considered by the conference committee, by whom it was finally adopted. (Congressional Record, Forty-seventh Congress, first session, part 2, p. 1531; part 3, p. 2368; part 4, pp. 3666, 3667.)

III.

It is also a well received rule in this court that a settled line of decisions by an inferior court, or even by an executive department, is not to be disturbed without the strongest warrant. *Stuart* v. *Laird*, 1 Cranch, 299, 309; *Edwards* v. *Darby*, 12 Wheat., 210; *United States* v. *State Bank of North Carolina*, 6 Pet., 29; *United States* v. *MacDaniel*, 7

Pet., 1; *United States* v. *Moore*, 95 U. S., 760, 763; *United States* v. *Pugh*, 99 U. S., 265, 268, 269.

Applying this rule to the present case, we submit that the long line of decisions of the Court of Claims beginning with the case of *Graham* v. *United States*, 1 C. Cls., 380, at the October Term, 1865, of that court, and coming down to the present case and others, (*Langston* v. *United States*, *Lightner* v. *United States*, and *Belknap* v. *United States*,) decided at the present term, all of them holding the same doctrine as that asserted in the present case, that an insufficient appropriation for a salary is no discharge of the liability, are of too long standing, and have been too long acquiesced in by the law officers of the United States, now to be lightly overthrown.

In the case just mentioned, *Graham* v. *United States*, 1 C. Cls., 380, it was provided by law, "That all laborers in the employment of the government in the Executive Departments and on the public grounds, in the city of Washington, shall receive an annual salary of $600 each, from and after the first day of July, 1856." The legislative, executive and judicial appropriation act for one of the years for which the claimant claimed payment, made the following appropriation: "For compensation to the laborer in charge of the water-closets in the Capitol, $365, and twenty per cent. thereon, per act 22d April, 1854, making together $438." Yet notwithstanding this specific designation in the appropriation act of the labor upon which the claimant was employed, he was held entitled to recover the difference between the amount thus appropriated, and the salary fixed by law for all laborers in the departments and public grounds at Washington.

In *French* v. *United States*, 16 C. Cls., 419, the claimant was auditor of railroad accounts. The salary of his office was fixed by law at $5,000, but the legislative, executive, and judicial appropriation act for the fiscal year ending June 30, 1880, appropriated only $3,600 for payment

of his salary. The Court of Claims held that he was entitled to recover the remaining $1,400. See also *Patton* v. *United States*, 7 C. Cls., 362, 371; *Briggs* v. *United States*, 15 C. Cls., 48; *Collins* v. *United States*, 15 C. Cls., 22;—all asserting the same doctrine; and there are other cases involving the same principle, where the point was considered so well settled that no opinion was delivered. Such are *Marberry* v. *United States*, *Bliss* v. *United States*, *Verdi* v. *United States*, and *Cox* v. *United States;* in all of which the judgments are reported at 17 C. Cls., 447, 448, but without opinions.

In none of the above cases was any appeal ever taken, so far as I am aware. It would seem that such long acquiescence as this in a settled course of decisions should bind the Government, as it would certainly be held to bind claimants were the decisions adverse.

It is true that in *Fisher* v. *United States*, 15 C. Cls., 323, and now pending here on appeal, that court held that the words, "in full compensation for the service of the fiscal year," &c., worked an absolute reduction of the salary for the fiscal year, and prevented any claim arising for a balance over the amount appropriated; though even this conclusion was not reached without a vigorous dissent from one justice. The present case, however, is happily free from all such embarrassments as this. The Indian appropriation acts as above cited, which make the insufficient appropriations for payment of the claimant's salary, contain no words directing that the sums appropriated shall be in full compensation for the service.

In the case just cited, (*Fisher* v. *United States*,) the Court of Claims used the following language: "We give no force to the fact that the claimant received the reduced rate without objection. He was entitled to the compensation which the law attached to his office, and the defendant's liability could not be discharged by paying a less sum, even though he had executed a receipt in full." 15 C. Cls., 330.

We leave the question as to the so-called "receipts in full" to the above language of the Court of Claims, and their reasoning in the present case. Any supposed release of the government in this manner was wholly without consideration, and cannot bar a claim for a salary which is expressly annexed by law to the office.

GEORGE A. KING,
Attorney for Appellee.

APR 2 1883

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

THE UNITED STATES, APPELLANT, vs. CHARLES MITCHELL. } No. 1237. Appeal from the Court of Claims.

BRIEF FOR THE APPELLANT.

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In the Supreme Court of the United States.

OCTOBER TERM, 1882.

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BRIEF FOR THE APPELLANT.

The substantial facts in the case are that Mitchell was duly appointed interpreter at an Indian agency in Nebraska, and served (between July 1, 1878, and June 30, 1882) three years and seven months, receiving compensation without objection at the rate fixed by annual appropriation acts, which was $300 per annum.

The court below sustained his claim to recover the difference between compensation at that rate and $400 per annum, the rate fixed by section 2070 Revised Statutes.

ASSIGNMENT OF ERROR.

The United States assign for error the judgment rendered in favor of Charles Mitchell upon the facts found,

which do not sustain such judgment, but require one in favor of the defendants below and present appellants.

BRIEF.

It will hardly be disputed that if Congress had placed in the appropriation act of May 27, 1878 (20 Stat., 65), which may be taken as a sample of the acts in question, such language as "The salaries of all interpreters appointed by virtue of sec. 2068 of the Revised Statutes shall be three hundred dollars a year each for the fiscal year ending June 30, 1879," it would have operated as a repeal or suspension of section 2070 for that year.

The court below, as appears by Fisher's case, is content with much less plain language. It finds that effect in the mere insertion of the words "in full compensation" in the general clause at the head of an appropriation act.

Assuming its judgment correct, as we believe it to be, the question here presented is: What substantial difference is there between such an act and one in which those words are not employed? The practical difference found by the court is that in the former case Congress intended to temporarily reduce the salaries of a considerable number of public officers by appropriating a less sum than was provided by precedent legislation, and in the latter it had no such intent, although it did the same substantial thing because it failed to insert "in full compensation," or some equivalent expression.

A fair test of this construction would be to inquire

what intent from that point of view Congress in fact did or could have in the acts in question, and apparently the answer would be that Congress intended to pay certain officers a portion only of their lawful compensation for the current year, on account, as it were, leaving the balance to be appropriated at some other time or to be collected by suit in the Court of Claims.

The absurdity of ascribing such an intent to Congress is manifest. Surely with general prosperity prevailing and an overflowing Treasury, there could neither be occasion nor disposition to postpone or obstruct the payment of any just obligation.

The history of legislation in the Congresses which passed these acts, adverted to by the court below in Fisher's case, shows conclusively that the Congress intended to reduce expenditures, and that one of the principal methods employed was the reduced appropriations for compensation of salaried officers. In view of this well-established fact the occurrence of the phrase "in full compensation" in a particular appropriation act can be regarded only as emphasizing the general intent; otherwise, it must be presumed that in passing the various appropriation acts Congress was governed by one policy as to officials in one, and by another in another, though no possible reason can be given for such course. Why, for example, should the Congress have intended to reduce the salaries of Territorial judges and other officers included in the legislative, executive, and judicial appropriation act any more than of interpreters and agents included in the appropriation act in question passed at the same session?

Passing to the text of the act, the title and the appro-

priating clause show that its object was to provide among other things for the "*current expenses*" of the Indian service, among which, of course, were included official salaries. Can it be supposed that Congress, as to interpreters and agents, in fact intended, in utter disregard of the stated purpose of the act, to provide for but a part of the current expenses, and that without a rational motive or excuse? Is it not more reasonable to presume that Congress considered a temporary reduction necessary or desirable, and took the method in its judgment best fitted to accomplish that purpose? Its power to make such a reduction is undoubted (Embry's case, 100 U. S., 680), and the only question is as to its intent, for with the policy of reduction or of the method employed the courts are not concerned.

Consider, further, the uniform course of legislative dealing with this matter. With offices created and existing only by virtue of an act of appropriation, of which there are many examples, no question can be raised; but taking the strongest other case, as, for instance, an office not judicial, with a fixed tenure and salary attached, there have been many instances in which Congress, without abolishing or regulating in terms the office, has omitted any appropriation of salary (see act August 15, 1876, 19 Stat., 168, where the salary of naval solicitor is dropped for a year; and so also as to Third Assistant Secretary of State, 20 Stat., 183), or has reduced (or even increased) the appropriation for compensation for one or more years. Is it not more reasonable to hold that where Congress before a given fiscal year takes such action, it is in effect a notice to the incumbent that his services during that period would not be required,

or should be rendered at a reduced rate of compensation, than to presume that it intended to evade or repudiate its just obligations?

A good illustration of this course of legislation is afforded by the provisions enacted from time to time respecting the office and compensation of Indian agents.

By section 2052, Revised Statutes, the appointment of forty-two agents was provided for, with specified distribution and at fixed rates of compensation, but on the day of the passage of that enactment an appropriation act was passed providing for sixty-nine agents, and modifying both the distribution and salaries as provided in the Revised Statutes (18 Stat., 147).

In consecutive appropriation acts thereafter the number provided for has varied from fifty-eight to seventy-four. The provision of the Revised Statutes fixing the salaries has been continually disregarded either in special instances or by general changes both of increase and decrease as the respective Congresses deemed expedient, and the President uniformly authorized to dispense with the services of any agent considered in his discretion unnecessary. (See the following statutes: March 3, 1875, 18 Stat., 420; August 15, 1876, 19 Stat., 420; March 3, 1877, 19 Stat., 271; May 27, 1878, 20 Stat., 63; February 17, 1879, 20 Stat., 295; May 11, 1880, 21 Stat., 115; March 3, 1881, 21 Stat., 485; May 17, 1882).

By comparing the provisions of the same acts respecting the interpreters with sections 2068, 2070, Revised Statutes the same condition of things will be found as has been specified with respect to agents.

All this indicates the intention of Congress to treat the

Indian service as a plastic organization, to be moulded by annual legislation so as to conform with the varying and temporary exigencies of the case, and the existence of any limitation upon its authority to so regulate it in the general provisions of the Revised Statutes was never imagined. The opinion of the court below in Bradshaw's case (14 C. Cls. R., 78) on a similar question is pertinent in this connection. It referred to the course of legislation as indicative of the construction of the law, and said:

> Such has been practically the uniform contemporaneous construction by successive Congresses, by the public officers who have administered the law, and by the employés themselves who have received in monthly payments the amounts appropriated for them, and have given receipts therefor in full payment for their services, and we see no reason to change the same or to doubt their correctness.

As to the decisions cited by the court, it is to be observed that in Graham's case it does not appear that the question is discussed by the court, and the others, excepting the case of French, are not analogous. It is but recently, in fact, that cases of this kind have been introduced with such frequency before the court as to give practical importance to the question involved, and that will sufficiently account for its not having been brought up before. The very fact of their rarity in the past, notwithstanding the habitual legislation of Congress in the manner above indicated, tends to strengthen the construction we contend for.

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